



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 19, 1998

Ms. Joanna Lippman  
Fletcher & Springer, L.L.P.  
823 Congress Avenue, Suite 510  
Austin, Texas 78701

OR98-2785

Dear Ms. Lippman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 119631.

The Village of Bee Cave (the "Village") received a request for the following

1. Complaints of misconduct by former city administrator/city attorney Joe Ventura and former commissioner Johnathan [sic] Coker.
2. Complaints of sexual harassment against Mr. Ventura.
3. City council action taken in regard to the complaint against Mr. Ventura.
4. City council action taken in regard to the complaint against Mr. Coker.
5. City council action taken in regards to city secretary . . . as it relates to the complaint of sexual harassment.

You represent that you are producing to the requestor all agendas and minutes from open sessions that relate to the requested information. You claim that the requested information in the form of the memorandum and attachments from the village attorney/village administrator to the Travis County Attorney's Office for the investigation of possible criminal misconduct is excepted from disclosure under section 552.103 of the Government Code. You also claim that the Equal Employment Opportunity Commission ("EEOC") and

Texas Commission on Human Rights ("TCHR") complaint and related documents are also exempted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation.<sup>1</sup> Thus, under section 552.103(a) a governmental body's burden is two-pronged. The governmental body must establish that (1) litigation to which the governmental body is a party is either pending or reasonably anticipated, and that (2) the requested information relates to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); Open Records Decision No. 551 at 4 (1990). In the matter of the allegations of misconduct by village officials in the granting of a variance or a replat of a subdivision, no litigation is pending and none is reasonably anticipated. Therefore, you must disclose the memorandum and attachments from the village attorney/village administrator to the Travis County Attorney's Office.

As for the remaining information, we note that to establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

In the past, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the objective step toward litigation of filing a complaint with the EEOC. *See* Open Records Decision No. 336 (1982). Complaints against the

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<sup>1</sup>Section 552.103(a) excepts from required public disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

Village have been filed with both the EEOC and the TCHR. Based on those complaints, we agree that the Village reasonably anticipates litigation concerning the complaints. If, however, the opposing party in the anticipated litigation has seen or had access to any of the information in these records, there is no justification for now withholding that information from the requestor pursuant to section 552.103(a). In this case, the opposing party has had access to all of the submitted information concerning the complaint of sexual harassment and section 552.103(a) does not protect it from disclosure.

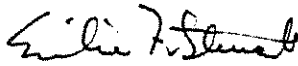
Nevertheless, we will apply section 552.101 of the Government Code to prohibit the release of confidential information contained in the submitted documents. *See* Gov't Code § 552.352. The requested information, which concerns complaints of sexual harassment and city council action taken on the complaints, includes some information that is private and may not be disclosed. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by constitutional or common-law privacy and, under certain circumstances, excepts from disclosure private facts about individuals. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld from public disclosure under a common-law right of privacy when the information is (1) highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files pertaining to an investigation of allegations of sexual harassment. The investigatory files at issue in *Ellen* contained individual witness and victim statements, an affidavit given by the individual accused of the misconduct in response to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *Id.* The court held that the names of witnesses and their detailed affidavits regarding allegations of sexual harassment was exactly the kind of information specifically excluded from disclosure under the privacy doctrine as described in *Industrial Foundation*. *Id.* at 525. However, the court ordered the release of the summary of the investigation with the identities of the victims and witnesses deleted from the documents, noting that the public interest in the matter was sufficiently served by disclosure of such documents and that in that particular instance "the public [did] not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements." *Id.* at 525.

Here, no adequate summary exists. Thus, pursuant to *Ellen*, you must release the submitted documents with the identities of victims and witnesses to the sexual harassment redacted from the documents. *Id.* We have marked information in the submitted documents which you must withhold because it is protected by common-law privacy.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Emilie F. Stewart  
Assistant Attorney General  
Open Records Division

EFS/nc

Ref.: ID# 119631

Enclosures: Marked documents

cc: Mr. Kelly Daniel  
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(w/o enclosures)